



SIDLEY AUSTIN LLP  
1501 K STREET, N.W.  
WASHINGTON, D.C. 20005  
(202) 736 8000  
(202) 736 8711 FAX

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cphillips@sidley.com  
(202) 736-8270

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August 6, 2008

Kristin Linsley Myles, Special Master  
Munger, Tolles & Olson LLP  
560 Mission Street, Twenty-Seventh Floor  
San Francisco, California 94105-2907

Re: State of South Carolina v. State of North Carolina, No. 138, Original

Dear Special Master Myles:

This letter responds to South Carolina's letter brief arguing that the Special Master should issue an Interim Report that includes her order granting the motions to intervene filed by Duke Energy, CRWSP, and Charlotte (collectively, "Intervenors"), and her order denying South Carolina's motion for clarification/reconsideration. The decision whether to issue an Interim Report unquestionably lies within the Special Master's discretion. Duke submits that the Special Master should decline to issue an Interim Report.

Because Intervenors are not injecting into this original case any claim not already before the Court, their participation does not expand the scope of the Court's original jurisdiction or otherwise alter the equitable-apportionment claim. Intervenors' party status will expedite this matter, while Supreme Court review of the collateral intervention order will unnecessarily expend resources and cause delay. If, however, the Special Master decides to issue an Interim Report, Duke requests that all discovery be stayed while Intervenors' party status is under challenge. Intervenors have extensive discovery-related responsibilities; and discovery should not proceed without them. Yet, they are entitled to know whether they are functioning as parties, with the accompanying rights and burdens, or as third-parties in the discovery process.

### Argument

South Carolina correctly notes that the Special Master has discretion to file an Interim Report with the Supreme Court when appropriate, and argues that it would be "appropriate" for the Special Master to file such a Report with respect to her intervention orders. *See S. Ct. Order, Orig. No. 138 (Jan. 15, 2008)* ("Jan. 15, 2008 Order") (directing the Special Master "to submit Reports as she may deem appropriate"). For several reasons, Duke urges the Special Master to exercise her discretion not to file an Interim Report at this time.

First, Intervenors' participation as parties is essential because their interests are directly implicated. Intervenors' party status also facilitates the resolution of this case because it provides the party States with direct access to information critical to resolving the equitable-apportionment claim and crafting a decree, eliminating the expense, delay and limits of third-

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party discovery. Significant time and resources have already been expended addressing intervention. Interlocutory Supreme Court review of the intervention orders will unnecessarily waste more time and resources on a matter that has already been correctly decided.

Second, the issuance of an Interim Report should delay this matter significantly. Although proceedings before a Special Master often continue while exceptions to an Interim Report are briefed and argued, it would be fundamentally unfair to Intervenors to do so here. The Supreme Court would be addressing the propriety of treating the Intervenors as parties. If Intervenors are not parties, they must be subpoenaed for document production and testimony and cannot be served with interrogatories or with requests for admission. While Intervenors' party status is under challenge, all discovery should be stayed because the parties' need for discovery from Intervenors is so central to the equitable-apportionment issues presented that it is not sensible to proceed with discovery without Intervenors.

Third, South Carolina's arguments seeking issuance of an Interim Report are overstated. It is true that Special Masters have issued, and the Supreme Court has reviewed, Interim Reports addressing intervention. But, it is unclear whether the issuance of an Interim Report was opposed in the cases cited, so no rule applicable here can be drawn from those cases. In any event, an Interim Report on intervention, like all Interim Reports except those specifically directed by the Court, is the product of a Special Master's exercise of discretion in particular cases, not the product of any rule. In suggesting the contrary, South Carolina places heavy emphasis on the *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* (Oct. Term 2004) ("Guide"), which uses intervention orders as one example of an appropriate subject for an Interim Report. But, the Guide itself states that it is not "intended" to "impos[e] binding or inflexible rules" on a Special Master, *id.* at 1; it simply provides basic guidance. In addition, the Guide indicates that the Special Master's discretionary decision whether "to report the decisions made in [memorandum opinions]" "[d]epend[s] on their significance and continued relevance to contested issues." *Id.* at 7. While Intervenors' party status is critical to Intervenors and their interests, it is not directly, legally relevant to the central contested issues – whether there should be an equitable apportionment and, if so, its terms.

South Carolina asserts that the Guide "specifically identifies motions to intervene as falling into a special category of motions as to which the Court specifically 'want[s] the Master to file an Interim Report with a recommendation for disposition of the motion before going further.'" SC Br. 2. This assertion takes the Guide's quotation out of context and incorrectly suggests that the Court has *explicitly* identified intervention orders as presumptively the subject of Interim Reports. The Guide's full sentence states only that "[d]epending on the type of relief sought by the motion, the Court may want the Master to file an Interim Report with a recommendation for disposition of the motion before going further." Guide at 7. The paragraph does not state that intervention orders fall into a special category where Interim Reports are required. The Guide's use of intervention orders as examples of the subjects of Interim Reports simply indicates that such orders are the subject of Reports in appropriate circumstances.

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As the Guide observes, the Court often refers motions to the Master, including “motions to intervene.” *Id.* at 7-8. But this fact does not mean the Court should receive an Interim Report when the referred motion is decided. The Court knows how to require an Interim Report of a referred motion when it wishes to receive one; notably, it did not so indicate here. *Compare, e.g.,* Jan. 15, 2008 Order (directing the Master “to submit Reports as she may deem appropriate”) (emphasis added), *with* Guide at 11 (“The Court may on occasion refer motions to the Master with a timeline for filing a Report and recommendation.”). Indeed, it is clear that there is no uniform mandate that intervention decisions be the subject of Interim Reports because the Court has, on occasion, received an Interim Report on intervention and declined even to allow the parties to file briefs on exceptions. For example, in *Arizona v. California*, 460 U.S. 605 (1983), cited in South Carolina’s letter brief at 2 n.\*, the Court “refused to allow the States to file exceptions at [the] time” “the Special Master issued a preliminary report . . . , granting the Indian Tribes leave to intervene in subsequent hearings on the merit[s].” 460 U.S. at 612-13. “[T]he Special Master held further hearings on the merits” and “issued his Final Report” before the Court eventually reviewed and affirmed the intervention order. *Id.* at 613.

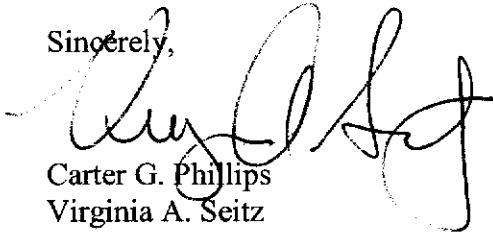
South Carolina also claims that immediate review is necessary to “show[ ] appropriate respect for the close attention the Court pays to the limits of its original jurisdiction.” SC Br. 3. This concern is relevant only when putative intervenors seek to expand the scope of the claims or relief in a matter. No Intervenor seeks to add, alter or expand the legal claims being litigated here. *Cf. Arizona v. California*, 460 U.S. at 614 (“The Tribes do not seek to bring new claims or issues against the states, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene”).

South Carolina further argues that an Interim Report is necessary to “show[ ] due regard for the limits” of the Master’s authority. SC Br. 3. This argument proves too much. With the sole exception of case management orders, the Master has authority only to recommend. Yet, plainly, all other orders are not appropriate subjects for Interim Reports. As the Court’s review and resolution of the intervention issue in *Arizona v. California* reveals, intervention is not “a dead issue at the end of a case.” SC Br. 3. If intervention has had a substantive effect on the merits – *e.g.*, if the intervenor has interjected issues or sought remedies that the States did not raise or seek – that order will be reviewed in conjunction with the Master’s Final Report.

Finally, Duke requests that the Special Master consider that South Carolina’s request for an Interim Report was unduly delayed. South Carolina’s decision to seek reconsideration was not filed promptly after the Master’s initial intervention order, and the resolution of that motion caused a further delay between the initial order and the request for an Interim Report. During that period, the parties moved forward on the Case Management Plan and discovery. This conduct weighs against issuance of an Interim Report. Moreover, in this setting, Duke’s request that all discovery be suspended pending resolution of its party status should not be denied based on South Carolina’s view that such a postponement – necessary to treat Intervenors fairly – would delay this case.

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Sincerely,



Carter G. Phillips  
Virginia A. Seitz  
Roger G. Martella  
Ileana Maria Ciobanu  
Counsel for Duke Energy

cc: Attached Service List

IN THE  
SUPREME COURT OF THE UNITED STATES

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No. 138, Original

STATE OF SOUTH CAROLINA,  
*Plaintiff,*

v.

STATE OF NORTH CAROLINA,  
*Defendant.*

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**Before the Special Master**  
**Hon. Kristin L. Myles**

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**CERTIFICATE OF SERVICE**

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I HEREBY CERTIFY that I have this day served, upon all counsel required to be served, **DUKE ENERGY CAROLINAS, LLC'S LETTER BRIEF REGARDING INTERIM REPORT** by emailing and depositing the indicated number of copies hereof, first class postage pre-paid in the United States mail, properly addressed to:

<b>Special Master</b>
Kristin Linsley Myles, Special Master Assistant to the Special Master Lori A. Nichols Munger, Tolles & Olson LLP 560 Mission Street, Twenty-Seventh Floor San Francisco, California 94105-2907 Phone: (415) 512-4000 Fax: (415) 512-4077 myleskl@mto.com tovarac@mto.com lori.nichols@mto.com Copies: Original and 4 copies, plus email pdf

### **South Carolina**

Robert D. Cook Assistant Deputy Attorney General T. Parkin Hunter L. Childs Cantey Assistant Attorneys General 1000 Assembly Street, Room 519 Columbia, South Carolina 29201 Phone: (803) 734-3736 Fax: (803) 734-3524 agrcook@ag.state.sc.us phunter@ag.state.sc.us ccantey@ag.state.sc.us Copies: 3, plus email pdf (Send overnight deliveries to street address; send mail to P.O. Box 11549, 29211-1549 zip code)	David C. Frederick Scott H. Angstreich Scott K. Attaway David Sarratt Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. 1615 M Street, N.W., Suite 400 Washington, D.C. 20036 Phone: (202) 326-7951 Fax: (202) 326-7999 dfrederick@khhte.com sangstreich@khhte.com sattaway@khhte.com dsarratt@khhte.com Copies: 3, plus email pdf
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### **North Carolina**

Christopher G. Browning, Jr. James C. Gulick Marc D. Bernstein J. Allen Jernigan Jennie W. Hauser North Carolina Department of Justice 114 West Edenton Street Raleigh, North Carolina 27603 Phone: (919) 716-6900 Fax: (919) 716-6763	cbrowning@ncdoj.gov jgulick@ncdoj.gov mbernstein@ncdoj.gov ajern@ncdoj.gov jhauser@ncdoj.gov Copies: 5, plus email pdf (Send overnight deliveries to street address; send mail to P.O. Box 629, 27602 zip code)
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### **Intervenors** **Duke Energy Carolinas, LLC**

Carter G. Phillips Virginia A. Seitz Ileana M. Ciobanu Sidley Austin LLP 1501 K Street, N.W. Washington, D.C. 20005 Phone: (202) 736-8270 Fax: (202) 736-8711 cphillips@sidley.com vseitz@sidley.com iciobanu@sidley.com Copies: 3, plus email pdf	Garry S. Rice Associate General Counsel Duke Energy Corp. Legal Affairs – EC03T 526 South Church Street Charlotte, North Carolina 28202 Phone: (704) 382-8111 Fax: (980) 373-9903 gsrice@duke-energy.com Copies: 3, plus email pdf (Send overnight deliveries to street address; send mail to P.O. Box 1006, 28201-1006 zip code)
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### **Catawba River Water Supply Project**

Thomas C. Goldstein Akin Gump Strauss Hauer & Feld, LLP Robert S. Strauss Building 1333 New Hampshire Avenue, N.W. Washington, D.C. 20036-1564 Phone: (202) 887-4000 Fax: (202) 887-4288 tgoldstein@akingump.com Copies: 3, plus email pdf	Jim Sheedy Susan Driscoll Driscoll Sheedy, P.A. 11520 North Community House Road Building 2, Suite 200 Charlotte, North Carolina 28277 Phone: (704) 341-2101 Fax: (704) 341-2105 jimsheedy@driscollsheedy.com sdriscoll@driscollsheedy.com Copies: 3, plus email pdf
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### **City of Charlotte, North Carolina**

James T. Banks H. Christopher Bartolomucci Hogan & Hartson LLP 555 Thirteenth Street, N.W. Washington, D.C. 20004 Phone: (202) 637-5600 Fax: (202) 637-5910 jtbanks@hhlaw.com hcbartolomucci@hhlaw.com Copies: 3, plus email pdf	DeWitt F. McCarley City Attorney Office of the City Attorney 600 East Fourth Street Charlotte, North Carolina 28202 Phone: (704) 336-2254 Fax: (704) 632-8328 dmccarley@ci.charlotte.nc.us Copies: 3, plus email pdf
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### **City of Charlotte, North Carolina – Continued**

H. Michael Boyd Senior Assistant City Attorney Charlotte-Mecklenburg Utilities 5100 Brookshire Boulevard Charlotte, NC 28216 Phone: (704) 391-5110 Fax: (704) 632-8336 hmboyd@ci.charlotte.nc.us Copies: 1, plus email pdf	Parker D. Thomson Hogan & Hartson, L.L.P. 1111 Brickell Avenue Suite 1900 Miami, Florida 33131 Phone: (305) 459-6613 Fax: (305) 459-6550 pdthomson@hhlaw.com Copies: 1, plus email pdf
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This the 6th day of August, 2008.

Virginia A. Seitz

Virginia A. Seitz by KSW